BRIEF IN SUPPORT OF PETITION.

I.

Opinion Below.

The Opinion filed by the Court of Claims appears at page 33 of the Record. It has not yet been reported.

II.

Jurisdiction.

Substitute Special Findings of Fact, Conclusion of Law and Opinion were filed on October 4, 1943 (R. 18). Thereafter, the Court of Claims entertained a motion by the petitioner for a new trial and filed its order overruling the Motion for a New Trial on November 1, 1943 (R. 38). Jurisdiction of this Court is invoked under the Act of February 13, 1925, Chap. 229, § 3, 43 Stat. 939, as amended by the Act of May 22, 1939, Chap. 140, 53 Stat. 752; Title 28 U. S. Code, § 288(b).

III.

Specification of Errors to Be Urged.

All of the errors set forth in the Assignments of Error (Petition, p. 9 *ante*) will be urged.

IV.

Facts.

The facts are stated in the Petition (*ante*, pp. 2-7) to which reference is made.

V.

ARGUMENT.

Point 1.

The Petitioner Has Been Deprived of Its Election to Recover Upon Quantum Meruit.

The Court of Claims stated in its opinion that the Government breached the contract by reason of the failure of the Contracting Officer and the Secretary of War to perform their duty of making decisions (R. 37).

This conclusion was based upon undisputed facts and, therefore, became a conclusion of law. *Brown-Crummer Inv. Co.* v. *Koss Const. Co.* (CCA8), 4 F. (2d) 682, 685; 13 *Corpus Juris*, p. 790, § 1011. Its place is among the Conclusions of Law rather than in the opinion alone.

The breach by the Contracting Officer was serious because under Articles 4 and 9 *immediate* investigation was essential while the facts were fresh and witnesses were available. The refusal of the Secretary of War to perform was serious because he denied the contractor such "due process" as the contract itself provided in terms.

The exact damage suffered by the petitioner is impossible of ascertainment so the petitioner elected fo recover upon *quantum meruit*.

The Court of Claims was wrong when it sought to limit the petitioner "to bring suit * * * under the contract" (*Feick* v. *Stephens et al.* (CCA6), 250 Fed. 185, 187-8) and thereby deprived the petitioner of a substantial property right in violation of the Fifth Amendment.

Congress may abolish or modify a remedy (*Tennessee* v. *Sneed*, 96 U. S. 69, 73) but until Congress acts, the aggrieved party is entitled to the recognition and enforcement of his existing rights by the Courts.

The law as to election of remedies upon breach of contract is stated in *Blair Engineering Co.* v. *Page Steel & Wire Co.* (C. C. A. 3), 288 Fed. 662 at pp. 664-5:

> "On a breach of a valid contract, the injured party has one of two legal remedies: He may sue on the contract for damages he has sustained by reason of the breach, *or he may consider the contract terminated by the breach and sue on the quantum meruit* under an implied contract and recover for his services and the amount expended by him on the contract." (Italics supplied.)

See also, to the same effect:

Ankeny v. *Clark*, 148 U. S. 345, 353;
Kneberg v. *Green Co.*, (C. C. A. 7) 89 F. (2d) 100, 104.

This Court has sustained recoveries upon such basis.

U. S. v. *Behan*, 110 U. S. 338, 345, 347;
Clark v. *U. S.*, 95 U. S. 539, 543;
Salomon v. *U. S.*, 86 U. S. (19 Wall.) 17, 19.

In this case the petitioner has computed its claim by adding 15% for overhead expense and services to its cost of performance $167,286.40 (R. 142) making the total of $192,379.36, and by deducting therefrom the total amounts paid by the Government, $127,689.33 (R. 143, 148, 158) leaving a balance of $64,690.03 which is claimed in the petition (R. 4).

The Court of Claims approved an allowance of 20% in *Sheridan-Kirk Contract Co.* v. *U. S.*, 53 C. Cls. 82, 86; and the contract itself provides for a 15% allowance above cost on extra work (R. 112). Payment as claimed is at the rate of $4.154 per ton. The Government estimated the cost at $4.279 per ton with Army plant and equipment (R. 93).

Prayer for relief "either in a general manner, or in an

alternative or cumulative form'' when supported by the facts set forth in the petition is sufficient.

U. S. v. *Behan, supra,* at page 347;
Clark v. *U. S., supra,* at page 543.

POINT 2.

The Adoption by the Court of Claims of Certain Findings of the Contracting Officer Violates Due Process.

The petitioner claims that its rights have been violated through the denial by the Court of Claims:

1. Of due process of law as guaranteed by the Fifth Amendment; and

2. Of due process as established by the parties in their contract.

The petitioner complains that the Court of Claims adopted *ex parte* findings of the Contracting Officer (R. 32, 33, 37) made December 9, 1938, nearly a year after the petitioner had completed the job to the satisfaction of the Government (R. 148). These findings affected substantial rights of the petitioner.

The Contracting Officer who made the findings was Col. A. K. B. Lyman (R. 159). He is the same Col. Lyman whose unfulfilled promises to investigate and determine the facts commenced at least as early as December 10, 1936 (R. 122, *cf.* R. 107, 131).

Articles 4 and 9 of the Contract (R. 111, 113) required prompt investigation by the Contracting Officer. In none of his letters does Col. Lyman assert that the notifications by the Contractor came too late. The Government first discovered the changed conditions as shown by its official notices. The contract required no further notice by the Contractor.

Col. Lyman was, therefore, interested in clearing his own skirts from his defaults under the contract; and proceeded to do so in his *ex parte* findings. He found no conditions to exist that would have required him to adjust the contract.

He gave the Contractor no opportunity to submit proofs or to attack the "proof" he considered *nor does he specify all proofs he considered.* Nevertheless, he comments in Finding 31 (R. 157): "No proof is offered in support of his (the Contractor's) statement that &c."

Due process of law requires a hearing before judgment. Hence, Col. Lyman's arbitrary exercise of power, which had not been granted him by the terms of the contract, violated the due process clause of the Constitution and the adoption of his findings by the lower court repeated the violation.

As this Court said in *Garfield* v. *Goldsby*, 211 U. S. 249, at page 262:

> "* * * there is no place in our constitutional system for the exercise of arbitrary power, * * *"

The terms of the contract gave Col. Lyman no authority to exercise over the Contractor the power described by this Court in *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 227 U. S. 88, 91, where it is said:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by *no other officer,* administrative body or tribunal under our Government." (Italics supplied.)

The agreement providing for the determination by the Contracting Officer of facts in dispute cannot logically be extended to include a waiver of a fair hearing.

The doctrine strongly applies where the trier has a personal interest to protect.

Such a situation was apparently contemplated in the contract because, under Article 15, the Contractor had the right to appeal to the head of the department (in this case, the Secretary of War) from the findings of the Contracting Officer (R. 114).

After an appeal, the decision of the head of the department *alone* was binding on the Contractor. This petitioner appealed (R. 31, 36). The Secretary of War refused to perform (R. 31, 36). Hence, Col. Lyman's findings have no evidentiary force except as admissions against interest.

But the provision for appeal clearly implied a record of a hearing had before the Contracting Officer to be submitted on appeal so that the appellate authority could test the soundness of the findings from which the appeal was taken. The omission would have been cured if the Secretary of War had accorded the Contractor a hearing in the nature of a trial *de novo*.

Lloyd Sabaudo Societa v. *Elting*, 287 U. S. 329, 335-6.

Here there was no opportunity given the Contractor for any hearing and no record was made. The maps referred to in Par. 31 of Col. Lyman's findings (R. 157) were not supplied the Contractor and are not in evidence in this action.

In the case at bar, the findings of the Contracting Officer adopted by the lower court related to the existence of changed conditions at the bar (Finding 7, R. 22-23; *cf.* Par. 31, R. 157) and to unsuitable weather conditions (Sp. Finding 8(o) (t), R. 30-33; *cf.* Pars. 25-28; R. 154-156). The court's adverse findings on these subjects had no other support in the record. They were contrary to the otherwise uncontradicted evidence (R. 69, 72, 73).

Official Government publications, compiled from data supplied by the Contracting Officer's own office (R. 93), detailed "changed" conditions, *e. g.:*

The Department of Commerce issued a bulletin on July 1, 1936, stating in part:

> "From the bar at the mouth of the river to Haverhill numerous shoals exist and *changes have taken place* due to floods which occurred last spring. * * * There is a depth of about 4 feet over the bar at low water and the charts cannot be relied upon. Pending a resurvey of the river, Chart 331 will be cancelled." (Italics supplied.) (See R. 22.)

As to C. & G. S. Chart No. 1206 (R. 21) depths at the Merrimack River were expunged (R. 159).

This bar, concededly an obstruction (R. 60, 67, 69, 77) was warranted no obstruction in Par. 7 of the Specifications (R. 117) which stated:

> "There are no bridges or other obstructions between the proposed work and the sea."

The president of the contractor who prepared the bid was not a seaman (R. 81) and relied upon the representations of the Government (R. 84-6).

This bar was such an obstruction that it could be crossed *only* during the last three hours of the flood tide and then only with a calm sea (R. 67, 89). Granite was trucked overland at extra expense so the Contractor could work when the bar could not be crossed (R. 68, 84).

Weather conditions alone were not indicative of working conditions at the site (R. 60-1, 78, 80). It was necessary to make visits to the site in a boat (R. 61-2, 67, 68, 70, 77, 78) to determine whether work could be done.

Conditions during operations in years past were *not comparable* (R. 63, 64, 65, 69, 71) and the petitioner was deprived of the right to cross-examine those whose data was used by Col. Lyman in making his *ex parte* findings (R. 154).

The right to cross-examine is a constitutional one.

Gonzales v. *Zurbrick* (CCA6), 45 F. (2d) 934, 937.

POINT 3.

The Court of Claims Erroneously Failed to Find the Facts Concerning the Undisputed Issuance of Change Order No. 1 Which, as a Matter of Law, Annulled the Penalty Provisions.

Change Order No. 1 modified the size and shape of the mounds at the exposed seaward ends of the jetties (R. 85). It was issued on September 22, 1937 (R. 85, 108). The modified completion date of the contract was May 9, 1937, as fixed by the lower court.

The Contractor's superintendent was notified by the Government Inspector on the job in March, 1937,—*before the completion date*—that the mounds were to be modified (R. 104, 105). So work on the mounds was suspended during the favorable summer months (R. 71, 85, 86). The Government Inspector controlled the placing of stone (R. 64, 119, Par. 16; R. 112, Art. 18).

The work on the mounds was completed and the job was accepted by the Contracting Officer on December 22, 1937 (R. 19). That was a reasonable time within which to perform the work (R. 86). The Inspector testified that there were only two days during that period when the Contractor could have worked but did not and on those two days the plant was under repair (R. 102, 103).

Nevertheless, the Contractor was penalized for the period between May 9, 1937, and December 22, 1937, (227 days at $25—$5,675) and the lower court approved (R. 25, 33, 36).

The Change Order annulled the obligation for liquidated damages and the Contractor became entitled to a reasonable time thereafter within which to complete performance.

The law applicable to the state of facts here existing was defined by this Court in the case of *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236, 243, where

the Court approved the ruling in *Mosler Safe Co.* v. *Maiden Lane Safe Deposit Company*, 199 N. Y. 479, at page 489. There the Court of Appeals, speaking through Gray, J., stated:

> "Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled and, in the absence of some provision under which another date can be substituted, it cannot be revived. If the respondent (contractor) failed to complete within a reasonable time after crediting the appellant's (employer) delays, then the latter had a cause of action for the former's neglect and the measure of damages would be the actual loss proved to have been sustained."

This is in accord with prior decisions of the Court of Claims in *Ittner* v. *U. S.*, 43 C. Cls. 336, 351, and *Camp Sales Corp.* v. *U. S.*, 77 C. Cls. 659, 664.

The petitioner does not concede that it was responsible for any delay (R. 65, 68, 70, 72, 73). Delay attributed to it by the Government arose from physical conditions misrepresented and warranted against by the Government. The petitioner in good faith struggled on to completion (R. 87) and complied with all instructions of the Contracting Officer, however arbitrary. (*United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, 11-12; *United States* v. *Smith*, 256 U. S. 11, 16-17.)

The Contractor was obliged to accept the change under Article 3 of the contract (R. 111). It received no consideration for being obliged to work at the most exposed portion of the site during the roughest season of the contract period—which unduly protracted the maintenance of the plant on the job (R. 105, 80)—and, hence, gave up no rights.

> "A clause in a Government contract without consideration is nonenforceable." (*Burke & James, Inc.* v. *U. S.*, 63 C. Cls. 36, 57.)

Col. Kingman, the original contracting officer, had ruled (R. 99) that weather conditions between November 15th and January 1st were "unsuitable" (R. 119, Par. 15).

In passing, we point out that Col. Kingman's suspension of operations ran 77 days from November 15, 1935, and not 65 days from November 27th (R. 19) as the lower court erroneously held (R. 36). Although the Contractor was not obliged to commence work until 20 days after Notice to Proceed (R. 117), work had been commenced on November 8, 1935 (R. 82, 120-1), and the 20 days' grace were included in the 365 day performance period (R. 117).

Even if the contract were not to be considered as rescinded for breach by the Government, the measure of recovery because of the Change Order would be the same as that demanded in the petition in view of the extension of the performance period to finish the work under the Change Order. The amount claimed covers only cost of plant maintenance during the periods of operation as required by the Contracting Officer and materials, plus reasonable overhead and services.

Therefore, the refusal of the lower court to find the undisputed fact of the issuance of the Change Order and its terms and the approval of the penalty deductions disregarded the petitioner's substantial rights.

POINT 4.

The Finding That the Average Velocity of the Current Throughout the Tidal Cycle Was 2.08 Miles Per Hour Is Wholly Without Support in the Evidence.

The determination of average current velocity was determinative of a vital issue—a material misrepresentation in the Specifications that directly and seriously hindered and delayed performance by the Contractor (R. 82, 88), and materially increased its cost through extending the time of

performance. The heavy current acting with the undertow would snap lines (R. 73) and cause violent surging that made the granite blocks swing on the derrick and endanger life and limb (R. 64, 67, 69, 78, 105).

The testimony of five experienced seamen—two of them Government witnesses—was unanimous that the average current at the site was over 3 miles per hour (four of them fixed it between 3¼ to 4 m. p. h. (R. 60, 61, 66, 76, 78, 79, 89)).

They, as practical experts (R. 66), gauged the current against the known speed of vessels stemming it (R. 61, 73, 74, 76, 89, 99-100).

The Government Inspector, Captain Head, frankly stated on direct examination that the Contractor was affected by the current because it could not moor its stone lighters at, or move them from, the site *except during slack water* between tides, when the current was less than 3 miles per hour (R. 102).

In paragraph 7 of the Specifications, the Government represented:

> "The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations."

A current of 2.1 m.p.h. would have presented no difficulty in operation (R. 67, 70, 71, 72, 74, 77, 79, 87-8). There is no evidence in the record that a current of 2.1 m.p.h. would have produced the effects actually experienced by the Contractor.

Slack water between tides existed for about an hour (R. 77, 79, 80) with the result that *every day during daylight hours* between slack before ebb and slack before flood—a period of about 7½ hours, because of the river discharge (R. 61, 66, 69, 77)—the Contractor's floating equipment could not be moved for about *six hours*.

Similarly, during the period between slack before flood and slack before ebb—about 5 hours (R. 66, 69, 77)—the Contractor's plant could not be moved for *another three hours every day.*

Then add to this the undisputed fact that, because of the swift current, no work at all could be done on the north jetty during the ebb tide (R. 69, 71) and some idea may be gained of the serious effect of this excessive current upon operations.

The lower court relied solely upon the testimony of the Government witness, Malkasian, who had made some investigation in November, 1937, to learn the *direction* of the currents at and near the breakwater on the *ebb* tide alone (R. 99). His conclusion of an average tidal current of 2.08 m.p.h. was based upon a graph (A-A) shown on Exhibit M (R. 163), which was plotted with *three* points representing the *mean* of the velocities in the three groups of his observations (indicated by the jagged lines on that Exhibit) when the tide was falling (1) to six feet above mean low water, (2) from six to three feet above mean low water and (3) from three feet down to an undefined limit. It does not take much knowledge of mathematics to appreciate the absurdity of an attempt to plot a curve beyond three given *loci*, as this witness did not obtain a foundation for his testimony.

This graph A-A shows that the "period of observation" extended for but 3 hours and 45 minutes of an assumed ebb tidal period of 6½ hours. By dividing the area within the whole curve by 6½ a result of 2.08 m.p.h. was obtained.

The catch-as-catch-can mathematics of this "expert" witness which the lower court adopted are incontestably and demonstrably wrong.

This Court said in *Baltimore & O. R. R. Co.* v. *U. S.*, 298 U. S. 349 at page 378:

> "And they rightly say that opinions of experts unsupported by adequate actual tests may not safely be substituted for concrete data."

Malkasian's data can apply only to his period of observation. Any assumption outside of that period is not evidence. In fact, the *mean* of Malkasian's observations taken while the tide was falling below the level of six feet above mean low water produces a velocity of 3.177 m.p.h. On the last day he terminated his observations immediately after he had found a velocity of 4.4 m.p.h. near the north jetty (Exhibit L).

On the basis of Malkasian's testimony, the lower court found an average of 2.08 m.p.h. during the *whole* "tidal cycle" (R. 22, 35).

But the tidal cycle is about 12½ hours and "includes the ebb and flood tides" as stated by the Government engineer, Mr. Porter (R. 92, 93). Malkasian's observations included but 3.75 hours of the 12.5 hours in the tidal cycle and his result was a *mean* of a total of but 24 individual current observations all taken at *different* points during three days (R. 94). This was not the average current at any point. "Average" used as an *adjective*—as in this contract—means "usual". (*Cf. Wickard* v. *Filburn,* 317 U. S. 111, 125). The bidders were interested in the effect of the usual current upon operations—not in some abstruse mathematical calculation nor in the quotient of a sum divided by the number of its terms.

Since the Government drew the contract, its language is to be construed strictly against the defendant. "Mean" is distinguished in the same paragraph of the Specifications (Par. 7) where the representation is made that the "mean range of the tide is 7.9 feet" (R. 117).

Hence, this essential finding by the lower court was contrary to all the evidence and was without any evidentiary support in the record.

"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The Chicago Junction Case, 264 U. S. 258, 265.

See also:

Shields et al. v. *Utah Idaho Central R. R. Co.,* 305 U. S. 177, 185;

I. C. C. v. *L. & N. R. R. Co.,* 227 U. S. 88, 91.

Respectfully submitted,

HORACE M. GRAY,
Attorney for Petitioner.

January 20, 1944.